Kong Seng Chai v Perusahaan Nasional Otomobil Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-85–01 OF 2018
TENGKU MAIMUN, MARY LIM AND HASNAH HASHIM JJCA
4 APRIL 2019

Civil Procedure — Judicial review — Appeal against — High Court dismissed appellant's application for order of certiorari to quash decision of Industrial Court — Industrial Court refused appellant's complaint that his dismissal by first respondent without just cause and excuse — Appeal against High Court's decision — Whether the High Court erred in affirming decision of Industrial Court without properly construing merits of case

Labour Law — Employment — Dismissal — Industrial Court refused appellant's complaint that his dismissal by first respondent without just cause and excuse — High Court dismissed judicial review application by appellant — Whether High Court erred in affirming decision of Industrial Court without properly construing merits of case

This was an appeal against the dismissal for an order of certiorari to quash the decision of the Industrial Court that had refused the appellant's complaint that his dismissal by the first respondent (in the High Court) had been without just cause and excuse. Briefly, the appellant was employed by the first respondent on a fixed three year term contract. There was a change of management in the third quarter of 2012. On 28 December 2012, a Task Force Customer Compliance Meeting to discuss various issues in relation to the supply of cars to the customers was scheduled for 9.30am. The meeting was to be chaired by the first respondent's Deputy Chief Executive Officer, Lukman bin Ibrahim (COW1), the most senior member of the management team as the first respondent did not have a CEO at that time. The appellant, as head and general manager, supply chain management was required to attend and make presentation. It was not in dispute that the appellant was present for a few minutes before the meeting started. He then left. He did not return, neither did he attend the meeting. Disciplinary proceedings were then immediately commenced against the appellant. The disciplinary proceedings culminated in the termination of his employment. These proceedings started with a show cause letter issued by the first respondent requiring the appellant to answer four charges framed against him before 6 September 2012. In essence, those charges relate to allegations of breaches of trust and confidence that the first respondent had in the appellant as a member of the management team. The appellant duly replied vide letter dated 6 September 2012. On 29 September 2012, the appellant

A received a notice of inquiry dated 26 September 2012 wherein he was informed that because his '... explanation which is unsatisfactory and our investigation in the matter, a domestic inquiry will be convened for 'you to answer the following alleged charges levelled against you'. The domestic inquiry was scheduled at 10.30am on 2 October 2012. In the same notice, the appellant B was informed that three charges were now levelled against him. The appellant attended the domestic inquiry on 2 October 2012, complained that the charges differed from those in the show cause, and pleaded that he was not guilty of all three charges. The inquiry was then adjourned to 4 October 2012 in order to allow the appellant time to prepare and 'get his witnesses'. After C hearing held over several hearing dates, the appellant received on 2 November 2012, a letter dated 30 October 2012, informing him that he had been found guilty of the charges preferred against him. He was further informed that due to the gravity of his misconduct, his services with the first respondent was terminated with effect from 24 October 2012. The matter was then referred to D the Industrial Court wherein it was heard *de novo*. Upon evaluating the evidence, the Industrial Court found that on a balance of probabilities, the totality of evidence before the court proved misconduct on the part of the appellant for which he was terminated by the first respondent. Unhappy with the decision, the appellant then moved the High Court for judicial review and E sought for an order of certiorari. The High Court dismissed the appellant's application, hence, the present appeal.

Held, allowing the appeal and setting aside the decision of the High Court with costs:

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(1) Although the decision of the Industrial Court obviously involved findings of fact, that in itself was no reason to retreat from the examining the Industrial's Court findings, particularly where there were complaints that the decision reached was perverse, irrational, unreasonable, devoid G of reasonable justification, and the like. It was incumbent on the court to examine those findings in order to determine if the threshold for the grant of the order of certiorari was met. Had the learned judge carried out this evaluation, it would have been found that the Industrial Court had seriously misapprehended the acts of serious misconduct alleged against H the appellant and a case for grant of the reliefs sought had been made out (see para 38).

(2) In the evaluation of whether the appellant had been dismissed with just cause or excuse, the learned chairman said that 'this is not a case about the claimant's termination due to his failure to wear a tie'. The learned I chairman opined that it was what had ensued after the appellant had left the meeting that amounted to serious misconduct. As much as the Industrial Court tried to distance itself from the necktie or the lack of not wearing one, that the disciplinary action that led to the termination had nothing to do with it, that was far from truth. The entire disciplinary

action that culminated in the termination of the appellant had everything to do with the necktie. In fact, it emanated from the appellant not wearing a necktie to a meeting where he was to do a presentation. But for the necktie or the non-wearing of the necktie, the appellant would have simply got on with the presentation (see paras 40–41).

(3) The Industrial Court was duty bound to determine whether there was misconduct as alleged when hearing a complaint under s 20 of the Industrial Relations Act 1967. In the event misconduct as alleged was established, the Industrial Court had to determine whether the proven misconduct constituted just cause or excuse for the dismissal. The evaluation and conclusion reached by the Industrial Court disregarded relevant factors (see paras 55–56).

(4) There was no evidence that the failure to wear a necktie and the misinterpretation of the 'wave' were deliberate or even contumacious, challenging and questioning the whole fabric of the relationship between the parties here and which destroyed the trust in that relationship. Yet, the Industrial Court failed to give proper regard to the appellant's version of the charges and his understanding and interpretation of the 'wave' before invoking the doctrine and confirming the first respondent's decision of termination. There was no attempt or evidence of the Industrial Court giving at any time, the benefit of doubt to the appellant, to the interpretation of the 'wave' and the events that transpired at the meeting (see paras 64–65).

(5) The High Court, as the reviewing court, ought to have examine the decision of the Industrial Court properly and in accordance with the applicable legal principle as discussed. Had it done so, the High Court would have found that the evaluation and findings by the Industrial Court were not supported by the evidence before the court (see para 71).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap perintah certiorari yang tidak dibenarkan untuk mengenetepikan keputusan Mahkamah Perusahaan yang tidak menerima aduan perayu yang mana pemecatannya oleh responden pertama (di Mahkamah Tinggi) adalah tanpa sebab dan alasan yang munasabah. Secara ringkasnya, perayu adalah di bawah pengajian responden pertama untuk tempoh tetap kontrak selama tiga tahun. Terdapat pertukaran pengurusan pada suku ketiga pada tahun 2012. Pada 28 Disember 2012, Mesyuarat Pasukan Petugas Pematuhan Pelanggan untuk membincangkan pelbagai isu-isu berkaitan dengan bekalan kereta-kereta kepada pelanggan-pelanggan dijadualkan pada 9.30am. Mesyuarat itu dipengerusikan oleh Timbalan Ketua Eksekutif Operasi responden pertama, Lukman bin Ibrahim (COW1), ahli paling senior pasukan pengurusan memandangkan responden pertama tidak mempunyai CEO pada masa itu. Perayu, selaku ketua dan pengurus besar,

pengurusan rantai bekalan diperlukan hadir dan melakukan pembentangan. Adalah tidak menjadi pertikaian bahawa perayu telah hadir beberapa minit sebelum mesyuarat bermula. Beliau kemudiannya beredar. Beliau tidak kembali semula, mahukan menghadirkan diri untuk mesyuarat tersebut. Prosiding disiplin kemudiannya dimulakan serta-merta terhadap perayu. Prosiding disiplin berkait rapat dengan penamatan pengajiannya. Prosiding ini bermula dengan surat tunjuk sebab yang dikeluarkan oleh responden pertama yang mana memerlukan perayu untuk menjawab empat tuduhan yang dikeluarkan terhadapnya sebelum 6 September 2012. Pada asasnya, tuduhan-tuduhan tersebut berkaitan dengan pertuduhan pecah amanah pada responden pertama terhadap perayu selaku ahli pasukan pengurusan. Perayu kemudiannya menjawab kepada surat yang bertarikh 6 September 2012. Pada 29 September 2012, perayu menerima Notis Siasatan bertarikh 26 September 2012 di mana beliau dimaklumkan bahawa oleh sebab '... penerangan yang tidak memuaskan dan siasatan kami mengenai perkara itu, satu siasatan domestik akan diadakan untuk 'kamu menjawab tuduhan-tuduhan yang dikatakan yang diberikan terhadap kamu'. Siasatan domestik dijadualkan pada 10.30am pada 2 Oktober 2012. Di dalam notis yang sama, perayu telah dimaklumkan bahawa tiga tuduhan telah dikenakan ke atasnya. Perayu menghadiri siasatan domestik pada 2 Oktober 2012, mengadu bahawa tuduhan-tuduhan berbeza daripada yang di dalam tunjuk sebab, dan mengatakan bahawa beliau tidak bersalah untuk ketiga-tiga pertuduhan. Siasatan kemudiannya ditangguhkan ke 4 Oktober 2012 supaya bagi memberikan masa kepada perayu untuk membuat persediaan dan 'mendapatkan saksi-saksi'. Selepas pendengaran diadakan pada beberapa tarikh pendengaran, perayu menerima pada 2 November 2012, satu surat yang bertarikh 30 Oktober 2012, memaklumkan beliau bahawa beliau telah dijumpai bersalah atas tuduhan-tuduhan yang dikenakan ke atasnya. Beliau kemudiannya dimaklumkan bahawa berkenaan dengan tahap serius salah laku, perkhidmatan beliau dengan responden pertama ditamatkan berkuat kuasa daripada 24 Oktober 2012. Perkara ini kemudiannya dirujuk kepada Mahkamah Perusahaan yang mana didengar *de novo*. Setelah meneliti keterangan, Mahkamah Perusahaan mendapati pada keseimbangan kebarangkalian, kesemua keterangan di mahkamah membuktikan salah laku pada bahagian perayu yang mana ditamatkan perkhidmatannya terhadap responden pertama. Tidak berpuas hati dengan keputusan, perayu kemudiannya berpindah ke Mahkamah Tinggi untuk semakan kehakiman dan meminta perintah certiorari. Mahkamah Tinggi tidak membenarkan permohonan perayu, oleh itu, memfailkan rayuan di sini.

Diputuskan, membenarkan rayuan dan mengenetepikan keputusan Mahkamah Tinggi dengan kos:

(1) Walaupun keputusan Mahkamah Perusahaan secara terangnya melibatkan penemuan fakta-fakta, ini bukanlah sebab untuk tidak

mengendahkan pemeriksaan penemuan Mahkamah Perusahaan, lebih-lebih lagi di mana ada aduan-aduan mengenai keputusan yang tercapai adalah boleh dibantah, tidak rasional, tidak berpatutan dan tidak mempunyai justifikasi yang berpatutan dan seumpamanya. Ia adalah penting untuk mahkamah bagi memeriksa penemuan-penemuan ini untuk memutuskan jika tanda aras untuk pemberian perintah certiorari dipenuhi. Jikalau hakim terpelajar menjalankan pemeriksaan ini, ia akan didapati bahawa Mahkamah Perusahaan telah dengan serius salah faham mengenai perbuatan-perbuatan salah laku yang serius yang dikatakan terhadap perayu dan kes untuk memberikan relif-relif yang diminta telah dilakukan (lihat perenggan 38).

(2) Dalam pemeriksaan sama ada perayu telah dipecat dengan sebab dan alasan yang munasabah, pengerusi yang terpelajar mengatakan bahawa 'kes ini bukanlah mengenai penamatan Penuntut berdasarkan kegagalannya untuk memakai tali leher'. Pengerusi yang terpelajar memberikan pendapat bahawa apa yang telah berlaku selepas perayu meninggalkan mesyuarat menjurus kepada salah laku serius. Sebolehnya Mahkamah Perusahaan mencuba untuk menjarakkan dirinya daripada tali leher dan akibat tidak memakai yang sama, bahawa tindakan disiplin yang menunjukkan kepada penamatan tidak mempunyai kaitan dengannya, dan jauh daripada kebenaran. Semua disiplin yang menyumbang kepada penamatan perayu semuanya berkaitan dengan tali leher. Malah, ia bermula daripada perayu tidak memakai tali leher ke mesyuarat yang mana beliau diperlukan untuk melakukan pembentangan. Tetapi untuk tali leher atau tidak memakai tali leher, perayu sewajarnya meneruskan dengan pembentangan (lihat perenggan 40–41).

(3) Mahkamah Perusahaan mempunyai tugas untuk memutuskan sama ada terdapat salah laku yang dikatakan semasa mendengar aduan di bawah s 20 Akta Hubungan Perindustrian 1967. Dalam keadaan di mana salah laku yang dikatakan telah dibuktikan, Mahkamah Perusahaan kena memutuskan sama ada salah laku yang dibuktikan membentuk sebab dan alasan yang munasabah untuk pemecatan. Pemeriksaan dan kesimpulan yang dicapai oleh Mahkamah Perusahaan tidak mengendahkan faktor-faktor yang relevan (lihat perenggan 55–56).

(4) Tiada keterangan bahawa kegagalan untuk memakai tali leher dan kesalahan interpretasi 'wave' adalah sengaja atau melampaui batas, mencabar dan mempersoalkan semua fabrik hubungan antara pihak-pihak di sini dan yang memutuskan kepercayaan dalam hubungan. Tetapi, Mahkamah Perusahaan gagal memberikan perhatian yang sewajarnya terhadap versi perayu mengenai tuduhan-tuduhan dan salah fahamnya dan interpretasi 'wave' sebelum menggunakan doktrin tersebut dan mengesahkan keputusan responden pertama untuk

pemecatan. Tiada percubaan atau keterangan Mahkamah Perusahaan diberikan pada setiap masa, manfaat keraguan terhadap perayu, kepada interpretasi dan peristiwa-peristiwa yang terjadi semasa mesyuarat (lihat perenggan 64–65).

(5) Mahkamah Tinggi, sebagai mahkamah yang menyemak semula, sepatutnya memeriksa keputusan Mahkamah Perusahaan dengan teliti dan menurut kepada prinsip undang-undang yang terpakai seperti yang dibincangkan. Jika ia melakukan sedemikian, Mahkamah Tinggi akan menemui bahawa pemeriksaan dan penemuan-penemuan Mahkamah Perusahaan tidak disokong dengan keterangan di mahkamah (lihat perenggan 71).]

Notes

For cases on appeal against, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5933–5935.

For cases on dismissal, see 8(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 1178–1258.

Cases referred to

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129; [1981] 1 LNS 30, FC (refd)

Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789; [1997] 2 CLJ 11, FC (refd)

Malayan Banking Bhd v Association of Bank Officers, Peninsula Malaysia & Anor [1988] 3 MLJ 204, FC (refd)

Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam [2006] 3 MLJ 493, CA (refd)

Menon v The Brooklands (Selangor) Rubber Co Ltd [1968] 2 MLJ 186; [1968] 1 LNS 77, FC (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)

Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 5 MLJ 113; [2006] 3 CLJ 837, HC (refd)

Petroliam Nasional Bhd v Nik Ramli Nik Hassan [2004] 2 MLJ 288; [2003] 4 CLJ 625 FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145; [1997] 1 CLJ 147, FC (folld)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Anor [1995] 2 MLJ 753, FC (refd)

Legislation referred to

Industrial Relations Act 1967 s 20, 20(3)

Appeal from: Application for Judicial Review No WA-25–170–06 of 2017 (High Court, Kuala Lumpur)

Kong Seng Chai representing himself.
Thavalingam C Thavarajah (Ahmad Addlan Nabil with him) (Lee Hishammuddin Allen & Gledhill) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] This was an appeal against the dismissal for an order of certiorari to quash the decision of the Industrial Court that had refused the appellant's complaint that his dismissal by the first respondent had been without just cause and excuse. After due deliberations and considerations of the submissions, the appeal records and the award of the Industrial Court and more particularly, the decision of the High Court, we unanimously allowed the appeal for the following reasons.

THE COMPLAINT

[2] The appellant was employed by the first respondent on a fixed three year term contract with a monthly salary of RM30,000 with effect from 20 June 2011.

[3] There was a change of management in the third quarter of 2012. On 29 August 2012, a Task Force Customer Compliance Meeting to discuss various issues in relation to the supply of cars to the customers was scheduled for 9.30am The meeting, held at the VIP Lounge of the premises, was to be chaired by the first respondent's deputy chief executive officer, Lukman bin Ibrahim ('COW1'), the most senior member of the management team as the first respondent did not have a CEO at that time.

[4] The appellant, as head and General Manager, Supply Chain Management was required to attend and make a presentation. It is not in dispute that the appellant was present for a few minutes before the meeting started. He then left. He did not return, neither did he attend the meeting.

[5] Disciplinary proceedings were then immediately commenced against the appellant. In fact, action was taken against him the very next day after the meeting, on the 30 August 2012. The disciplinary proceedings culminated in the termination of his employment.

[6] These proceedings started with a show cause letter dated 30 August 2012 issued by the first respondent requiring the appellant to answer four charges framed against him before 6 September 2012:

> Mr Kong Seng Chai
>
> Staff No 00032502
>
> General Manager
>
> Supply Chain Management
>
> Dear Kong,
>
> *SHOW CAUSE LETTER*
>
> We have received a report that you have been alleged to have committed several acts of misconduct. As such you are required to explain the following charges leveled against you:
>
> *Charge 1*
>
> You had committed an act of insubordination when you attended the Management Task Force customer complaint meeting held on 29 August 2012 at 9.30am at VIP Lounge, COE and you did not return to attend the said meeting when you were instructed by the Deputy Chief Executive Officer to wear a necktie during your presence at the commencement of the meeting.
>
> *Charge 2*
>
> You have been absent from the Management Task Force customer complaint meeting held on 29 August 2012 at about 9.35am to 2 p.m. at VIP Lounge, COE; when you know or ought to know that you have to be present in the said meeting.
>
> *Charge 3*
>
> You have not complied with the Company's policy and guideline dated 14 May 2012 and a reminder policy and guideline dated 16 August 2012, by not wearing a necktie during your presence at the commencement of the Management Task Force customer complaint meeting held on 29 August 2012 at 9.30am at VIP Lounge, COE.
>
> *Charge 4*
>
> By committing the acts as in Charge 1 to Charge 3 above, you have breached the trust and confidence of the Company being a member of the Management Team and especially holding the position of a General Manager, Supply Chain Management.
>
> The above charges whether taken singly or in combination and if satisfactorily established constitute clear violation of your duty of good faith and fidelity which you owed to the Company in that you have failed to exercise reasonable care and diligence and to act in the best interest of the Company and have breached your fiduciary duties to the Company.
>
> We hereby request a written explanation from you as to why the Company should not take disciplinary action against you. We would expect your explanation to reach the undersigned by 6 September 2012. Should you fail to submit your explanation

within the stipulated date and time, we will presume that you have no explanation to offer and therefore we will proceed to take appropriate disciplinary action against you.

You are hereby suspended with half pay with effect from today until further notice. During the period of suspension, you are not allowed to enter the Company's premises or attend any function or activities on behalf of the Company.

Yours sincerely,

PERUSAHAAN OTOMOBIL NASIONAL SDN BHD

Sgd.

WAN ROSLAN WAN ABBAS

Director Group Human Resource

c.c. Dato' Lukman Ibrahim

Deputy Chief Executive Officer

I hereby acknowledge receipt of the letter and fully understood the contents herein.

(KONG SENG CHAI)

[7] In essence, those charges relate to allegations of breaches of trust and confidence that the first respondent had in the appellant as a member of the management team; that the appellant was in 'clear violation of your duty of good faith and fidelity which you owed to the Company in that you have failed to exercise reasonable care and diligence and to act in the best interest of the Company and have breached your fiduciary duties to the Company'.

[8] The appellant duly replied vide letter dated 6 September 2012. The contents of his reply are as follows:

Dear Sir,

RE: *REPLY TO SHOW CAUSE LETTER DATED 30 AUGUST 2012*

I refer to the show cause letter dated 30 August 2012, Ref No GHR/IR/016/32502, duly signed by your good-self and hand delivered to me by Encik Nadzrin-HR wherein I am asked to submit my explanation in writing by 6 September 2012 as to why the disciplinary action should not be taken against me based on the charges stated therein.

Before I respond to the said show cause letter and the four (4) charges preferred against me, perhaps it is best that I should state an account of the relevant incidents that transpired on 28 August 2012 and 29 August 2012. It is my hope that this will provide a better explanation.

Among others, the relevant incidents are as follows:

1) Preparatory meeting was called by En Abdul Rashid at 3.00–5pm on the 28th August 2012, in his office wherein:

° I attended this meeting at the request of En Abdul Rashid.

° Key points within this meeting that are relevant to the events transpired during the meeting with the Deputy Chief Executive Officer at 9.30 am on 29 August 2012 are as follows:

(i) En Hisham, previously ETM head, now newly reassigned to the Deputy Chief Executive Officer's office, informed that the Deputy Chief Executive Officer only wanted to meet the Sector Heads and not any of their subordinates, indicating that I'm NOT supposed to be in that meeting. However, En Abdul Rashid did inform that he wanted me to go for this meeting to make the presentation. Thereafter, he'll assume responsibility in making the necessary reports to the Deputy Chief Executive Officer himself.

(ii) Only when I asked, I was told what to prepare for the meeting. The meeting ended before 5pm and immediately thereafter I went back to my office. En Hashim and En Sarul were both called to my office immediately for the necessary preparatory work. The necessary data were only given to me by En Hashim just before 7pm. As I have a dinner appointment for which I was already late, I had to take the data back home to work.

(iii) After my dinner appointment, I had to work till just before midnight to complete the necessary presentation materials for the meeting on the 29 August 2012.

(iv) I duly attended the said meeting, in Proton's uniform.

2) Management Task Force meeting (which was being held for the first time) was called by the Deputy Chief Executive Officer at 9.30am at VIP Lounge, COE office on 29 August 2012.

° I had arrived in the COE office block much earlier than the scheduled meeting time in order to get the additional information which I feel will be required for the meeting and as such I met with Cik Alia since Cik Norelis was on medical leave, to obtain previous sales data and CBU stock records.

° I arrived at the meeting venue approximately 5 minutes before the stipulated starting time of 9.30 am.

° The Deputy Chief Executive Officer, En Abdul Rashid and 2 other persons were already seated.

° I proceeded to the laptop which was already on the table to copy my presentation file into the laptop but to my dismay before I could insert my thumb drive into the laptop, the Deputy Chief Executive Officer asked me, why I wasn't wearing a tie. I explained politely that I am from the plant. His response to my explanation was, 'Is this the plant?'

° I looked at him and I was waved out of the meeting by En Abdul Rashid. As I was walking out the meeting room, I could hear the Deputy Chief Executive Officer saying, 'Macam budak sekolah.'

° Having been waved out of the meeting room by En Abdul Rashid, I left

thinking that my presence is not required and I proceeded back to my office to continue working as usual.

° I forwarded the presentation file to the office of En Abdul Rashid, in case he may need it. Up to and until I left for lunch at 1 pm, I didn't receive any calls from anybody to return to the said meeting.

° With the experience of what had happened in the said meeting, I arrived for work the next day, 30 August 2012, with a tie, to be left in my office, in case I need it. At approximately 8.30 am, I walked to the Proton clinic to see the doctor for a follow up on a blood test done before the Hari Raya Puasa shutdown.

° Having seen the doctor, on my way back to my office, I received a call from En Nadzrin from HR and an appointment to meet was made at 9.45 am. I asked for En Hashim to see me on some work matters before the appointment with En Nadzrin as I still have time.

° I was shocked to receive a show cause letter from En Nadzrin wherein I was also suspended immediately with half pay. Even more shocking and embarrassing was the way I was escorted to leave my office immediately as though I am a criminal.

° With Nadzrin's approval, I took some of my personal files with me while being escorted out.

Now, having stated all the above relevant incidents, let me now explain the four (4) charges that has been preferred against me, which I think will effectively dispel the charges against me.

It is also apparent that all the four (4) charges are one and the same issue and for reasons best known to the Company, the said issue has been split into four (4) charges to portray as though I have committed serious misconducts.

In reply to *Charge 1*, I vehemently deny committing any act of insubordination as alleged therein. As I have explained hereinabove, after I entered the meeting venue, I was asked why I wasn't wearing a tie, to which, I provided a reasonable explanation that I am from the plant. Thereafter, for no apparent reason by way of sign language, I was waved out from the meeting room by En Abdul Rashid and there was no instruction whatsoever for me to return to the said meeting. Furthermore, as I have stated above, as mentioned by En Hisham I wasn't even supposed to be in the meeting because the Deputy Chief Executive Officer only wants to meet the Sector Heads (I am not one of them). However, I attended the meeting as requested by En Abdul Rashid and when he waved me out, I left the meeting thinking that my presence was not required.

In reply to *Charge 2*, I vehemently deny being absent from the said meeting as alleged therein. The fact remains that I was physically present in the meeting 5 minutes before the scheduled time. I left the meeting upon being waved out and/or instructed to leave the meeting upon being asked as to why I wasn't wearing a tie. In fact as I have stated hereinabove, I have spent so much time and effort, to the extent of working late at work, and till almost midnight at home, to complete the preparatory work so that I can attend the said meeting.

In response to *Charge 3*, I vehemently deny being not in compliance to the said Company's policy and guideline as alleged therein. It is within the Company's knowledge that the responsibilities within my job scope, and especially where my normal work office is, dictates that I'm involved in production and furthermore my office is within the plant premises. Hence, I have complied with the company's policy and guidelines issued, when I am wearing the company's uniform issued to me as that being my normal proper working attire. To state further, I had been wearing the uniform provided by the Company without a tie since I commenced employment and was not in any point in time told and/or warned that it is against the Company's policy and guidelines issued. Despite the express provision in the Company's policy and guidelines that I need not wear a tie, due to the incident in the said meeting, I do now have a tie in my office.

With regard to *Charge 4*, based on all the aforesaid explanations, I maintain my stand that I have always acted in the best interests of the Company and had never breached the so called 'trust and confidence' of my office as alleged by the Company. I strongly refute all the charges preferred against me and the Company it put to strict proof thereof.

Lastly, I would also like to raise a very strong protest over my suspension with half salary as there was no such provision under my existing employment contract with the Company. Hence, my suspension should be with full salary and I hereby demand that the same is rectified immediately, failing which I am left with no alternative but to resort to other recourse available to me under the employment law.

Based on all the above narrations, I sincerely believe that I did not commit any misconduct that warrants any disciplinary action to be taken against me as alleged. In fact my suspension by the Company is unwarranted. Hence, hope to hear a favourable reply at the soonest.

Please do not hesitate to contact me for further clarification on any matters in this letter you deem to be still unclear.

Thank you.

Yours sincerely,

Sgd.

Kong Seng Chai

GM-SCM

Proton

Cc Dato' Lukman Ibrahim

Deputy Chief Executive Officer

I hereby acknowledge receipt of the letter.

Name:

Date:

[9] On 29 September 2012, the appellant received a notice of inquiry dated 26 September 2012 wherein he was informed that because his '... explanation

which is unsatisfactory and our investigation in the matter, a domestic inquiry will be convened for you to answer the following alleged charges leveled against you'. The domestic inquiry was scheduled for 10.30am on 2 October 2012. In that same notice, the appellant was informed that three charges were now leveled against him:

Charge 1

In view of the importance of the Task Force Customer Complaint Meeting that was held on 29 August 2012 at 9.30am at VIP Lounge, COE; and the presentation you were to make to the Deputy Chief Executive Officer, it was incumbent upon you as a staff holding a General Manager position to ensure that you were properly attired by wearing a necktie when you attend the said meeting.

You failed to wear a necktie and had thereby acted disrespectfully.

Charge 2

At the Task Force Customer Complaint Meeting that was held on 29 August 2012 at 9.30am at VIP Lounge, COE, the Deputy Chief Executive Officer commented on your failure to wear a necktie and you were instructed by the Deputy Chief Executive Officer to get a necktie. It was clear and implied from his instruction that you were to return to the said meeting wearing a necktie and to make your presentation.

You left the meeting at about 9.35am and failed to return to the said meeting to make the presentation. In doing so, you had been insubordinate and disobedient.

Charge 3

In failing to make the presentation at the Task Force Customer Complaint Meeting that was held on 29 August 2012 at 9.30am at VIP Lounge, COE, you had also disobeyed the instruction of Encik Abdul Rashid Musa, Sector Head Technical Operations where the instruction was given earlier to you during the Preparatory Meeting on 28 August 2012 between 2.30 p.m. to 4.30 p.m. at his office.

[10] The appellant attended the domestic inquiry on 2 October 2012, complained that the charges differed from those in the show cause, and pleaded that he was not guilty of all three charges. The inquiry was then adjourned to 4 October 2012 in order to allow the appellant time to prepare and 'get his witnesses.'

[11] After a hearing held over several hearing dates, the appellant received on 2 November 2012, a letter dated 30 October 2012, informing him that he had been found guilty of the charges preferred against him. He was further informed that due to the gravity of his misconduct, his services with the first respondent was terminated with effect from 24 October 2012.

[12] The appellant resorted to the statutory dispute resolution mechanism found under the Industrial Relations Act 1967. He filed a complaint with the Minister of Human Resources who, on 13 October 2014 and pursuant to

s 20(3) of the Industrial Relations Act 1967, referred his representation to the Industrial Court.

[13] The representation before the Industrial Court was heard *de novo* where the domestic inquiry notes were not relied on. Three charges were levelled at the appellant. Those three charges were the same as those preferred at the domestic inquiry.

[14] The Industrial Court evaluated the evidence and found that on a balance of probabilities, the totality of the evidence before the court proved misconduct on the part of the appellant for which he was terminated by the first respondent. These were the findings of the Industrial Court on each of the three charges.

[15] On the first charge, the Industrial Court found that the appellant had failed to wear a necktie and had thereby acted disrespectfully. This was because the meeting was a 'first TFFM ever held by the Company and it was chaired by the most senior management head and it was inexcusable that the Claimant had not made an effort to wear a tie'. The Industrial Court held that as a general manager, the appellant 'should not have been at odds with the higher management'; that the appellant's attire 'was in direct contravention with the Company's rules and guidelines on the Company's dress code'.

[16] The second and third charges were taken together wherein the Industrial Court found that the appellant had been insubordinate and disobedient when the appellant 'willfully ignored the instructions of COW1 and COW2 and had failed to return to the meeting' to make the presentation. According to the Industrial Court, the appellant 'was well aware that the meeting was an important meeting during which he was required to make a presentation. Yet the claimant did not find it fitting to be properly attired for the meeting which was chaired by the most senior member of the management and had walked out of the said meeting upon being confronted by COW1'.

[17] The Industrial Court added that 'despite knowing that his presentation was required for the purposes of the said meeting, the Claimant had taken more than two hours to e-mail the presentation material to COW2's personal assistant'. The appellant was also said to have been 'insubordinate and defiant of his superior orders from the time he left the meeting room'; that because it was his duty, after receiving his superior orders, to ensure that he executed their orders and not for his superiors to chase after him to perform the assigned task', it was irrelevant that no one contacted him about his presentation.

[18] According to the Industrial Court:

> Although the Claimant's failure to conform to the Company's dress code in not wearing a neck tie for the meeting could be viewed as a minor misconduct, what had ensued after the Claimant had left the meeting was serious misconduct. It was a reflection of the Claimant's conduct and attitude in not being able to accept his superior's instructions to go back to the meeting with a neck tie and to deliver his presentation. These acts amount to serious acts of insubordination and disobedience. Furthermore, the Claimant was a General Manager and he was to make his presentation to the higher management of the Company. The insubordinate acts cannot be condoned by the Company as they may lead to disrespect and defiance in any establishment and cause conflicts and result in dire consequences.

[19] The Industrial Court then dismissed the claim, confirmed the decision of the first respondent in terminating the appellant as the punishment meted against the appellant; that following the doctrine of proportionality and acting 'with equity and good conscience and the substantial merits of the case without regard to the technicalities and legal form as stated under s 30(5) of the Act', found that the termination of the appellant's employment was 'appropriate and commensurate with the serious misconduct committed' by the appellant.

[20] The appellant filed an application for judicial review at the High Court.

AT THE HIGH COURT

[21] After reminding herself of the applicable principles as set down in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629 and the leading decisions discussed therein, the learned judge dismissed the application. The learned judge found that there were two versions of the 'effect of the wave' before the Industrial Court.

[22] Having heard and seen the witnesses giving evidence, the Industrial Court 'accepted the Company's version', a finding of fact which the High Court should not readily interfere following *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493. A further finding of fact made by the Industrial Court was that the 'acts of the applicant leaving the meeting without delivering his presentation as directed by the Company amount to serious acts of insubordination and disobedience and that the punishment of termination was appropriate and commensurate with the serious misconduct committed'; a finding that the High Court was also not inclined to disturb on the ground that 'the same cannot be said to be perverse'.

OUR DELIBERATIONS AND DECISION

[23] The place to start our deliberations must be the Federal Court's decision in *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd*. One of the

central issues in that case was whether the decision in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 had altered the principles commonly understood and applied when reviewing decisions of inferior tribunals.

[24] A reading of the Federal Court's decision in *Ranjit Kaur* indicates that it is not so much that the court cannot look at the facts, matters or issues that fell for consideration before the tribunal or in this case, the Industrial Court. Rather, due to the peculiar jurisdiction that is invoked, the courts have, to some degree, limited powers, purpose and jurisdiction. The courts look not just at the process but also the substance under which an inquiry, complaint or cause is conducted and the impugned decision reached. In that examination, the courts employ concepts of reasonableness or unreasonableness, relevance or irrelevance, rational or irrational, legality or illegality, proportionality or otherwise, all with the object of ensuring that procedural fairness and the rules of natural justice are observed. The courts avoid straying into the merits of the matter save in the exceptional cases and where there has been a violation of those principles just enunciated.

[25] This may be deduced from the decision in *Ranjit Kaur* where after acknowledging that over time, the courts have made 'inroads' into the field of administrative law, not confining itself to intervene where the decision making process of the impugned decision is flawed on the ground of procedural impropriety, the Federal Court had held that in the 'mother of all those cases', that is, *Rama Chandran*, such decisions may be scrutinised 'not only for process but also for substance. It allowed the courts to go into the merits of the matter. The distinction between review and appeal no longer holds'.

[26] The Federal Court nevertheless cautioned and reiterated the position that it had taken in *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 as well as in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625; that is, while the *Rama Chandran* decision is affirmed, that 'there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate'. At paras 17–19 of its judgment, the Federal Court added:

> [17] The Federal Court, in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235; *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9). However, there are exceptions to this restrictive principle where:

(a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached.

(See *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288).

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amenable to judicial review.

[27] In claims that there have been acts of misconduct justifying dismissal, the Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Anor* [1995] 2 MLJ 753 has held that the Industrial Court is required to determine whether the misconduct relied upon by the management as the basis of the dismissal was in fact committed by the workman; and if so, whether such grounds constitute just cause and excuse for dismissal. In the instant appeal, the learned judge found that the Industrial Court had made those considerations at paras 32 and 34 of the award. Since there were two versions of the effect of the wave, it was open to the Industrial Court to accept the respondent's version instead of the appellant's because it had seen and heard the witnesses. That acceptance of the respondent's version was a finding of fact that the court should not readily disturb or interfere.

[28] With respect, we disagree for several reasons.

[29] First, the respondent opted to conduct the hearing *de novo* before the Industrial Court. The notes of the domestic inquiry were thus not relied on. Be that as it may, what had precipitated the termination is nevertheless relevant and important.

[30] At the Industrial Court, three charges were framed against the appellant. Here, we need to record some observations about the charges.

[31] In our view, the charges that form the bedrock of the allegations of acts of serious misconduct that led to the termination of the appellant must still be the same as those levied at the domestic inquiry. After all, the complaint before the Industrial Court is that the termination is unjust or unfair.

[32] While the charges at the hearing before the Industrial Court were the same as those made against the appellant at the domestic inquiry, the appellant submitted that these charges differed from those found in the show cause letter dated 30 August 2012 that was issued to him. There were four charges in the show cause letter and those have already been set out earlier. At the hearing of the domestic inquiry, the appellant learnt for the first time that the hearing was in respect of three charges and those charges differed from the four in the notice to show cause. The appellant protested and the inquiry was postponed to enable him to prepare his defence.

[33] The hearing before the Industrial Court proceeded on the same three charges that were brought at the domestic inquiry. Those three charges however were never the subject or the charges in the show cause letter to which an explanation was sought from the appellant. The original four charges, though related to the events of 29 August 2012, were entirely different from the three charges finally brought against the appellant which culminated in his termination.

[34] In our judgment, while the respondent, as employer, is entitled to amend, drop or bring fresh charges against the appellant, an amendment which amounts to a new or fresh charge must go through the mill all over again. In other words, a new show cause letter ought to be issued containing this fresh charges and the appellant afforded an opportunity to reply. It is only after the explanation is considered that an inquiry can be properly initiated. Views to like effect may be seen in *KP Chakravarthi's Domestic Enquiry & Punishment* by MR Mallick (3rd Ed, Eastern Law House) para 13 at p 85.

[35] Having made the observation, we note that the appellant was given time to prepare his case before the inquiry. Although he raised this complaint before us, we do not see it as a ground of appeal in the memorandum of appeal and must therefore disregard the issue, though not without recording our concerns.

[36] Moving along then to our further reasons for disagreeing with the learned judge.

[37] The appellant had moved the court for an order of certiorari on, inter alia, the following grounds:

(a) that it was unreasonable and/or irrational to fault him or accuse him of having deliberately failed to return to the meeting room when he was under the reasonable apprehension that he was excused from the meeting:

> [Pemohon tidak boleh bersalah atas perbuatan mengingkar dengan sengaja, khususnya setelah membuat kesimpulan bahawa Pemohon telah menganggap bahawa beliau telah disingkirkan daripada mesyuarat tersebut. Kesimpulan seterusnya bahawa Pemohon adalah salah dalam mengingkar dengan sengaja adalah satu kesimpulan yang tidak munasabah/tidak irrational.]

(b) that the Industrial Court's decision was not reasonable and devoid of reasonable justification such that another reasonable tribunal similarly circumstanced would not have made such a decision:

> [ia telah membuat keputusan yang begitu tidak munasabah dan tidak mempunyai justifikasi yang munasabah sehingga tiada orang atau tribunal yang munasabah dalam keadaan yang sama boleh capai]

(c) that the Industrial Court failed to take into consideration relevant matters;

(d) that the Industrial Court took into account irrelevant matters; and

(e) that the Industrial Court erred or misapplied the general legal principles relating to wrongful termination and had instead acted contrary to the express provisions of the Industrial Relations Act 1967.

[38] Although the decision of the Industrial Court obviously involved findings of fact, it is our respectful view that that in itself is no reason to retreat from examining the Industrial Court's findings, particularly where there are complaints that the decision reached is perverse, irrational, unreasonable, devoid of reasonable justification, and the like. It was incumbent on the court to examine those findings in order to determine if the threshold for the grant of the order of certiorari is met. Had the learned judge carried out this evaluation, it would have been found, as we have, that the Industrial Court had seriously misapprehended the acts of serious misconduct alleged against the appellant, and a case for grant of the reliefs sought had been made out.

[39] There were three charges levied against the appellant. A careful read of the three charges show that they were charges that stood or fell together in the sense that they all relate to the appellant's failure to wear a necktie to the presentation. The first charge was obviously about the appellant's non-wearing of a necktie, that it was disrespectful. The second charge deals with the first respondent's reaction to that absence of a necktie; that it was clear and implied from the first respondent's 'instruction' that the appellant was to get a necktie and return to the meeting — that leaving and not returning were acts of

A insubordination and disobedience. And, the third charge was about the appellant's failure to return and thence do the presentation, that this was disobedience of instructions.

B **[40]** Yet, in the evaluation of whether the appellant had been dismissed with just cause or excuse, the learned chairman said that 'this is not a case about the Claimant's termination due to his failure to wear a tie' (see para 20 of the award), that 'Although the Claimant's failure to conform to the Company's dress code in not wearing a neck tie for the meeting could be viewed as a minor misconduct' (para 32)'. The learned chairman opined that it was what had ensued after the appellant had left the meeting that amounted to serious misconduct — see para 18 above.

[41] We must, with respect, disagree. As much as the Industrial Court tried to distance itself from the necktie or the lack of wearing one, that the disciplinary action that led to the termination had nothing to do with it, that is far from the truth. The entire disciplinary action that culminated in the termination of the appellant had everything to do with the necktie. In fact, it emanated from the appellant not wearing a necktie to a meeting where he was to do a presentation. But for the necktie or the non-wearing of the necktie, the appellant would have simply got on with the presentation.

[42] The three charges start with that first charge — 'You failed to wear a necktie and had thereby acted disrespectfully'. But for that charge, there would be no second or third charge. The second charge related to the appellant leaving the meeting and failing to return while the third charge related to the failure to make a presentation which failure amounted to disobedience.

[43] This is how it all started.

[44] At a meeting on 28 August 2012, Abdul Rashid bin Musa, head of technical operations sector ('COW2') requested the appellant to make a presentation to the new deputy chief executive officer, Lukman bin Ibrahim (COW1), on supply chain management issues including planning and production scheduling matters at a meeting to be held at 9.30am the following day.

[45] On the morning of the meeting, the appellant arrived about five minutes early. COW1, COW2 and two other persons were already seated in the meeting room. As the appellant set about readying the laptop for the presentation, he was asked by COW1 as to why he was not wearing a necktie. The appellant explained that he was from the plant to which COW1 retorted, 'Is this the plant?'.

[46] This is just about where the parties part ways on what was then said, what was done, what was meant, what was expected of the appellant, and finally what was understood by each of them.

[47] According to COW1, he told the appellant to go and get a tie. This was denied by the appellant who claimed that COW1 only asked him why he was not wearing one. The appellant then looked at COW2, and he claimed that COW2 waved him out of the meeting. And, so he left. As he was walking out, the appellant claimed that he heard COW1 saying, 'macam budak sekolah'. The appellant did not return to the meeting.

[48] The appellant's explanation for not returning was because he thought his presence was no longer required following from the 'wave' by COW2. He went back to his office, stopping at the sales office and the plant en route there where he continued working as usual. At around 11.49am, the appellant emailed his presentation material to the head of technical operations sector, COW2 with the remarks, '[A]ttached file for u/yr boss reference. The presentation that didn't happen'. At 1pm, the appellant went for his lunch. No one called the appellant to return to the meeting.

[49] The first respondent gave a different version of the events.

[50] According to COW1, he instructed the appellant to wear a neck tie before he was to proceed with his presentation at the meeting because the appellant was required to appear professional at the workplace at all times, as emphasised in the second respondent's internal memoranda dated 9 May 2012. COW1 further explained that he did not excuse the appellant from attending the meeting, neither did anyone obtain his permission to excuse the appellant from attending the same.

[51] Now, the 'wave' by COW2 was actually not in dispute. COW2 admitted waving. It was only the meaning or rather the implication of that wave that was in dispute. At the Industrial Court, COW2 in fact demonstrated how he had 'waved' the appellant; and this was demonstrated to us by learned counsel for the first respondent. It was a single wave, moving forwards or outwards. It was not a wave, from side to side.

[52] COW2 claimed that the 'wave' was a gesture to the appellant to go get a tie and come back. It was not meant to wave the appellant out of the meeting. COW2 further explained that COW1 waited for the appellant to return and continue with the scheduled presentation. Because the appellant did not return, he was recorded as 'MIA' or 'missing in action'. In short, the contention was that the appellant 'walked out of the said meeting upon being confronted by COW1'.

[53] On the other hand, the appellant construed the wave as meaning he was to leave the meeting.

[54] The Industrial Court chose to prefer the first respondent's version on the basis that there was still the matter of the presentation.

[55] As pointed out earlier, the Industrial Court is duty bound to determine whether there was misconduct as alleged when hearing a complaint under s 20 of the Industrial Relations Act 1967. In the event misconduct as alleged is established, the Industrial Court has to determine whether the proven misconduct constitutes just cause or excuse for the dismissal — see *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449 and *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129; [1981] 1 LNS 30:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go further into another reason not relied on by the employer or find one for it.

[56] In our view, that evaluation and conclusion reached by the Industrial Court disregarded relevant factors such as:

(a) the appellant's reasonable explanation and understanding of what the 'wave' by COW2 meant;

(b) that because COW1 was 'obviously angry and there was a period of silence in the meeting' following the exchange between COW1 and the appellant, the appellant turned to COW2 for instructions since it was COW2 who told the appellant or invited him to the meeting and that it was then that COW2 'waved me out';

(c) the ambiguous nature of the first respondent's 'New Corporate Dress Code Policy';

(d) how the appellant had always been attired in the manner he presented himself at the fateful meeting (this was in fact picked up in the domestic inquiry, see p 276 of the record of appeal); and

(e) the obvious lack of clarity and certainty in the first respondent's first charge — that it was *clear and implied* from COW1's instruction that the appellant was to return to the said meeting wearing a tie and to make the presentation.

[57] We agree with the appellant that if COW1's instructions were clear, there would have been no call for any implication, or even any need for COW2 to demonstrate his wave and explain what he meant. The fact remained that there were no verbal instructions as claimed by the first respondent; and if there were, such instructions were not heard by the appellant. This was not duly taken into consideration by the Industrial Court.

[58] Instead, the Industrial Court considered irrelevant factors such as it was 'inexcusable' for the appellant to not wear a tie because it was the first meeting chaired by the most senior management head. That such failure followed by what had ensued thereafter was a reflection of the appellant's attitude and conduct that amounted to serious acts of insubordination and disobedience of superior orders, which cannot be condoned.

[59] In our judgment, and for the reasons complained of by the appellant, if it was indeed true that COW1 had verbally instructed the appellant to get a necktie and return to the said meeting, there would have been no need for COW2 to further instruct the appellant to do the same, whether through a 'wave' or in any other manner. The appellant had explained his understanding of the instructions given the day before by COW2; that his presence at the meeting was not mandatory but his assistance to COW2 via the presentation was. He had also explained the efforts that he had taken in getting the presentation ready the night before despite the late instructions given the day before. This was backed up by his early attendance at the meeting and his efforts in setting up the laptop for his presentation before the episode with COW1; and his subsequent emailing of his presentation despite not being sought for by the first respondent.

[60] As for the non-wearing of the necktie, the appellant had also offered an explanation. In our regard, that explanation is reasonable in the light of the ambiguous nature of the dress code as seen at pp 211–214 of the record of appeal, and as found in the domestic inquiry. The appellant had further claimed that as he was part of 'production', he was exempted from wearing a necktie, and that he had always been so attired and that he had never been warned otherwise — see p 276 of the record of appeal; and there was no evidence led before the Industrial Court to suggest otherwise.

[61] There is also the matter of whether COW1 was 'angry' as explained by the appellant. Having examined the records, we find the appellant's explanation and narration of the events reasonable. If the presentation was critical or as important as claimed by the first respondent, there should have been some evidence of an attempt, at the very least, that the appellant was called to return to do the presentation, but he resisted or refused. In the view of

A the Industrial Court, applying the principle of superior orders, the first respondent was not obliged to seek out the appellant for that purpose.

[62] We must with respect, disagree. As pointed out by the Industrial Court, the Federal Court in *Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 5 MLJ 113; [2006] 3 CLJ 837:

> [28] In Malaysia, the general rule governing the doctrine of superior orders is nothing more that the duty of obedience that is expected of an employee. The most fundamental implied duty of an employee is to obey his employer's orders. The classic modern statement of that duty is found in the judgment of Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 2 All ER 285 to be as follows:
>
> > It is, no doubt, therefore, generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard — a complete disregard — of a condition essential to the contract of service namely the condition that the servant must obey the proper orders of the master and that, unless he does no, the relationship is, so to speak, struck at fundamentally.

[63] In the same decision, the Federal Court discussed one of the earliest decisions dealing with the question of lawful and reasonable orders, that is, the Federal Court's decision in *Menon v The Brooklands (Selangor) Rubber Co Ltd* [1968] 2 MLJ 186; [1968] 1 LNS 77, a case concerning an employee who had refused to acknowledge receipt of a warning letter where Pike CJ in affirming the decision of the court below said:

> This, in addition to the contumacious manner in which he refused to obey the instruction to see the manager of the estate, went far beyond a mere isolated act of disobedience of a lawful order. It challenged and rejected the whole fabric of the relationship of employer and effectively destroyed the trust which must subsist in any such relationship where the employee holds a responsible position.

[64] The above scenario is where the 'superior order' is clear and unambiguous. That was clearly not the position in the present appeal. There was no evidence that the failure to wear a necktie and the misinterpretation of the 'wave' were deliberate or even contumacious, challenging and questioning the whole fabric of the relationship between the parties here and which destroyed the trust in that relationship.

[65] Yet, the Industrial Court failed to give proper regard to the appellant's version of the charges and his understanding and interpretation of the 'wave' before invoking the doctrine and confirming the first respondent's decision of termination. There was no attempt or evidence of the Industrial Court giving, at any time, the benefit of doubt to the appellant, to the interpretation of the 'wave' and the events that transpired at the meeting.

[66] We must add that we find it hard to reasonably construe that the wave in question could possibly carry the meanings as claimed by the first respondent. In any event, the respondent's case is that those other meanings are implied. Where it is implied, then unless it is incapable of bearing any other reasonable construction or meaning which is not the case here, we are of the view that it was not wrong for the appellant to have understood it in the terms that he claimed. The benefit of doubt and possible other construction ought to have been afforded to the appellant.

[67] All this unfortunately were not considered at all by the Industrial Court. It was incumbent on the Industrial Court to examine the facts fully and properly, from both parties in order to determine whether the termination was just or with cause and in accord with all notions of equity and good conscience. We do not see the display or the exercise and application of those principles in the instant appeal.

[68] In order to determine the justness of the termination, it was also the duty of the Industrial Court to weigh and determine whether the reasons given by the appellant were made out, and that the punishment meted out by the first respondent was not disproportionate to the misconduct. Given the highly plausible and reasonable explanation of the appellant that as part of production, he had always not worn a necktie without event (he was similarly attired the day before), the first charge that he was therefore disrespectful when he failed to wear one should have been more properly and carefully evaluated by the Industrial Court. The learned chairman instead accepted without more, that the wearing of a necktie was in direct contravention of the first respondent's rules and guidelines. And, as we have seen from the policy, there is ambiguity insofar as it relates to the appellant which ought to have been given latitude and taken into account, which the Industrial Court, regretfully in its evaluation, failed to do so.

[69] Further, as the appellant was not wearing a necktie, and the first respondent wanted the appellant to wear one, the only way that the appellant could address that was to leave the meeting to go get one. The appellant could not get a necktie unless he left. Yet, he was disciplined for leaving — see second charge. We further agree with the appellant that by the terms of the second charge (clear and implied), the first respondent had acknowledged the ambiguity of the instructions as conveyed by the 'wave'. It was also irrational for the Industrial Court to conclude that the appellant's leaving the meeting was a reflection of his conduct and attitude in not being able to accept his superior's instructions, that he was willfully disobedient and insubordinate.

A **[70]** Under such conditions, the Industrial Court acting with equity and good conscience was obliged to call into question the disproportionate nature of the punishment of termination meted against the appellant.

B **[71]** We are of the view that the High Court, as the reviewing court, ought to have examine the decision of the Industrial Court properly and in accordance with the applicable legal principles as discussed. Had it done so, the High Court would have found that the evaluation and findings by the Industrial Court were not supported by the evidence before the court; that in the circumstances as explained by both parties, the acts of the appellant as complained of by the first respondent could not amount to acts of disrespect, insubordination or disobedience, let alone acts warranting termination in the terms and manner as decided by the first respondent. Contrary to the view of the High Court that the findings of fact by the Industrial Court were not open to scrutiny, we are of the firm view that the peculiar facts of this appeal fall within the exception to that general principle. The decision reached by the Industrial Court was perverse and so devoid of plausible justification that no reasonable tribunal similarly circumstanced could have reached in which case, the decision/award should not be allowed to stand and it must be quashed — see Federal Court decision in *Malayan Banking Bhd v Association of Bank Officers, Peninsula Malaysia & Anor* [1988] 3 MLJ 204. We are consequently obliged to exercise our appellate powers and intervene to right the error and misapprehension of the High Court.

F **[72]** We are in no doubt and have no hesitation in concluding that this instant appeal was an appropriate case which was amenable to the *Rama Chandran* approach and the High Court ought to have alerted itself to that. Findings of fact of the Industrial Court must nevertheless be scrutinised and the object and overarching principle of acting with equity and good conscience, the intent of the Industrial Relations Act 1967 be observed and applied in a real and meaningful way lest the function and purpose of judicial review fall into disuse or be a dead letter.

H **[73]** Finally, there is the matter of the remedy that ought to have been awarded by the Industrial Court had it been so inclined in the appellant's favour. We note that this was submitted by the appellant's then counsel before the Industrial Court — see p 335 of the record of appeal, and this would be the general purport of any judicial review application. We were however, not inclined to make any consequential order for the payment of any salaries, compensation or for variable pay as none were sought. On reflection, it may perhaps have been more appropriate had the matter be remitted to the Industrial Court for determination of the amount of compensation to be paid to the appellant.

CONCLUSION

[74] For the reasons set out, we agree with the submissions of the appellant and we allow the appeal. The decision of the High Court is set aside and we further allow the application in the terms as sought with costs.

Appeal allowed and decision of High Court set aside with costs.

Reported by Addibah Adnan